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Decision

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Case Number EWC/34/2020

15 February 2021

CENTRAL ARBITRATION COMMITTEE

TRANSNATIONAL INFORMATION AND CONSULTATION OF EMPLOYEES

REGULATIONS 1999 AS AMENDED

DECISION ON COMPLAINT UNDER REGULATION 21

The Parties:

Adecco Group European Works Council

and

Adecco Group (2)

1. Introduction

1) On 30 December 2020, Mr. Philip Sack of EWC Legal Advisers submitted a complaint to the CAC on behalf of the Adecco Group European Works Council ("AEWC"), (the Complainant) under Regulation 21 of the Transnational Information and Consultation of Employees Regulations 1999, as amended (TICER) in relation to the actions of Adecco UK (the Employer), which was the representative agent of the Adecco Group at the date of the complaint. The CAC gave both parties notice of receipt of the complaint on 31 December 2020. The Employer submitted a response to the CAC on 7 January 2021 which was copied to the Complainant.

2) In accordance with section 263 of the Trade Union and Labour Relations (Consolidation) Act 1992 (the Act), the CAC Chair established a Panel to consider the case. The Panel consisted of Professor Gillian Morris as Panel Chair and Mr. Robert Lummis and Mr. Gerry Veart as Members. The Case Manager initially appointed to support the Panel was Nigel Cookson; subsequently this role was fulfilled by Kate Norgate.

2. Background

3) Olsten (UK) Holdings Limited ("Adecco UK") was the representative agent of Adecco Group AG ("Adecco Group") for European Works Council purposes on the date of the complaint. On 24 May 2018 the AEWC entered into the Amended and Restated Agreement of the Adecco Group European Works Council ("the Agreement") with the Employer; this replaced a previous agreement dated 11 December 2013. It was common ground between the parties that the Agreement was governed by TICER at the date of the complaint. Provisions of the Agreement of particular relevance to this case are as follows:

Opening paragraphs of the Agreement

The Corporate Management of the Adecco Group, with its representative Agent being Olsten UK Holdings Ltd., a company duly incorporated and existing under the laws of the United Kingdom, with registered offices at Millennium Bridge House, 2 Lambeth Hill, London, EC4V 4BG, UK and the Special Negotiation Body consisting of the Adecco Group Employee Representatives in the European Economic Area (EEA), have agreed on the setting up of the Adecco Group European Works Council (AEWC).

If and when, Directives 94/45/EC and 2009/38/EC as well as subsequent Directives, and/or the national implementation thereof in the United Kingdom, are no longer effective within the United Kingdom, the Adecco Group shall appoint a Representative Agent established in a country which applies Directives 94/45/EC and 2009/38/EC as well as subsequent Directives. Before the Representative Agent is appointed, the Management may ask the opinion of the employee representatives within the AEWC on the Management proposal and such process will be finalized at the earliest convenience and ultimately within a period of two months after the Management proposal.

Clause IX.1 – Applicable law

This Agreement shall be legally binding and shall have the standing of an Agreement under Directive 97/74/EC and Directive 2009/38/EC, as implemented in UK Statutory Instrument 1999 No. 3323 (The Transnational Information and Consultation of Employees Regulations 1999), as amended by Statutory Instrument 2010 No. 1088 (The Transnational Information and Consultation of Employees (Amendment) Regulations 2010). This Agreement shall be governed by and interpreted in accordance with the laws of the United Kingdom.

Clause IX.3 – Amending the Agreement

The provisions of this Agreement may be amended at any time, without affecting the whole of this Agreement or its validity, by Management together with an absolute majority of the Employee Representatives.

Clause IX.5 – Dispute resolution and UK courts

The Adecco Group and the AEWC shall seek to resolve disputes in good faith and in the spirit of cooperation. Subject to the above-mentioned Clauses, if there is a material dispute about the meaning or operation of this Agreement, the following dispute procedure will apply:

Stage 1: There will be a discussion between the Steering Group and three Members of Management in an attempt to resolve the dispute. This stage shall not take longer than 90 days from the date when one Party notifies the other that it wishes to invoke this procedure (the AEWC Employee Representatives shall act by a majority) and providing a written explanation of the basis of the dispute including reference to the relevant provision of this Agreement which it is alleged has been breached.

Stage 2: If the dispute is not resolved at stage 1, both Parties will consider in good faith seeking to resolve the matter through mediation by a mutually agreed mediator. In the event that the parties cannot agree a mediator within a period of 60 days from the receipt of the written notification from the party invoking stage 2, the mediator will be appointed by the Chairman of the Centre for Effective Dispute Resolution.

Stage 3: If a dispute cannot be solved by mediation within six months, the Parties are free to litigate in court. Any dispute arising out of or in connection with this AEWC Agreement is subject to the exclusive jurisdiction of the UK courts.

4) In a letter dated 15 December 2020 representatives of the Employer and of Adecco Ireland Limited (Adecco Ireland) wrote to the Steering Group and Employee Representatives of the AEWC stating that European Union ("EU") law, including Directive 2009/38/EC on European Works Councils ("the EWC Directive"), would cease to be applicable in and to the UK on 1 January 2021 (CET). The letter stated that, in line with the Agreement and paragraph 3 of the European Commission's Notice to Stakeholders on the Withdrawal of the UK and EU Rules on European Works Councils dated 21 April 2020 [footnote 1], the Adecco Group "may" accordingly appoint a new representative agent for European Works Council purposes with effect from 1 January 2021 (CET). A later section of the letter read as follows:

On behalf of Adecco Group AG, we thank you for having expressed your opinion on its proposed change of representative agent. However, in the absence of us having been able to agree on the identity of a new representative agent jointly to recommend to Adecco Group AG and the imminent end of the United Kingdom's Brexit transition period, Adecco Group UK has unilaterally appointed Adecco Ireland Limited as its new representative agent for European Works Council purposes with effect from 1 January 2021 (CET).

The letter stated that, as a consequence, Adecco Ireland would give effect to the Agreement "except when construing it" in relation to specified matters. These matters related to the identity of the representative agent; the substitution of relevant Irish legislation and the laws of Ireland for TICER and UK law respectively in the preamble to, and in Clauses IX.1 and IX.5 of, the Agreement; and the substitution of "Dispute resolution and jurisdiction" for "Dispute Resolution and UK courts" as the heading to Clause IX.5.

3. The Complaint

5) The complaint dated 30 December 2020 submitted to the CAC reads as follows:

This complaint is made pursuant to regulation 21 of the TICE Regulations (Disputes about operation of European Works Council). Specifically, we say that the management of the Adecco Group has not complied with the terms of the Agreement by purporting to amend it in breach of … [Clause] IX.3 of the Agreement [footnote 2].

…. [Clause] IX.3 of the Agreement (Amending the Agreement) states: "The provisions of this Agreement may be amended at any time, without affecting the whole of this Agreement or its validity, by Management together with an absolute majority of the Employee Representatives" (emphasis added).

Management of the Adecco Group has informed the members of the EWC that, with effect from 1 January 2021, it will give effect to the Agreement by construing … [Clause] IX.1 (Applicable law), … [Clause] IX.5 (Dispute Resolution and UK courts) and other provisions in the Agreement in a way differently from the express wording of those clauses. without the agreement of an absolute

majority of the Employee Representatives. The effect would be to transfer the applicable law for the Agreement from the UK to Ireland, and to replace Stage 3 of the Dispute Resolution procedure contained in …[Clause] IX.5.

6) The Complainant said that Management had triggered the Dispute Resolution procedure in the Agreement in relation to its purported changes to the Agreement. The Complainant said that it hoped that a discussion between the Steering Group and Management under Stage 1 of that procedure would take place early in January 2021 and lead to a resolution of the dispute, failing which the Complainant would want it added to the issues on which Acas was currently mediating between the parties in relation to another matter. The Complainant stated that it was lodging the complaint to the CAC now as it was concerned that if the dispute resolution process were to fail and the Employer's purported changes to the Agreement were to go ahead the CAC may not have jurisdiction to hear the complaint if it was made after 31 December 2020 in view of the Employer's purported change to Clause IX.1. The Complainant asked the CAC to suspend its consideration of the complaint while the parties followed the Dispute Resolution procedure in the Agreement.

4. Summary of the Employer's response to the Complaint

7) In its response to the Complaint dated 7 January 2021 the Employer stated that, with effect from 1 January 2021 (CET), it had been replaced by Adecco Ireland as the Adecco Group's representative agent. The Employer said that it recognised that the AEWC Steering Group was disappointed with the Adecco Group's appointment of Adecco Ireland as its new representative agent but the Agreement made the following provision (henceforth referred to in this decision as "the second opening paragraph") in contemplation of EU law ceasing to be applicable to and in the UK, as had happened on 1 January 2021 (CET):

If and when, Directives 94/45/EC and 2009/38/EC as well as subsequent Directives, and/or the national implementation thereof in the United Kingdom, are no longer effective within the United Kingdom, the Adecco Group shall appoint a Representative Agent established in a country which applies Directives 94/45/EC and 2009/38/EC as well as subsequent Directives. Before the Representative Agent is appointed, the Management may ask the opinion of the employee representatives within the AEWC on the Management proposal and such process will be finalized at the earliest convenience and ultimately within a period of two months after the Management proposal.

The Employer said that, although not required, given the Agreement's use of the word "may", it had in a spirit of cooperation sought the AEWC employees' representatives' opinion on 10 June 2020 on the Adecco Group's proposal to appoint an Irish representative agent with effect from the end of the Brexit transition period.

8) The Employer said that it, together with Adecco Ireland, planned to continue to engage with the AEWC Steering Group in accordance with the Agreement's dispute resolution process which the Employer had proposed on 18 December 2020 when it was still the representative agent. As such, the Employer said that it did not oppose the Complainant's request for the CAC to suspend its consideration of the complaint. However the Employer also stated that it considered that it had no case to answer and had only proposed the dispute resolution process in the hope that this might lead the AEWC Steering Group to refrain from following through on its indication that it would commence a CAC complaint. The Employer said that as the AEWC Steering Group had

nevertheless proceeded to file this complaint it, together with Adecco Ireland, would support the CAC proceeding immediately to determine this complaint if, like the Employer and Adecco Ireland, the Complainant agreed to waive the requirement under the Agreement for the parties first to follow the agreed dispute resolution process.

9) The Employer said that it had not failed to comply "with the terms of the Agreement by purporting to amend it in breach of section IX.3 of the Agreement" as the Complainant had alleged; rather the Adecco Group had acted in accordance with its express obligation detailed in the Agreement and with paragraph 3 of the European Commission's Notice to Stakeholders. [footnote 3] The Employer said that Adecco Ireland, in a letter sent jointly with the Employer, had notified the AEWC employee representatives about how it would in future construe the Agreement in the light of paragraph 4 of the European Commission's Notice. [footnote 4] The Employer further submitted that the CAC could not consider an alleged future breach and that this complaint concerned such a breach as, at the time the Complainant made the complaint, the Employer had not amended the Agreement, purported to amend it or acted or failed to act as if it had been amended. The Employer said that regulation 21 of TICER was unambiguous that a complaint could only be made in respect of failures that had already happened and on the basis that the terms of a European Works Council agreement "have not been complied with". The Employer submitted that, albeit in different contexts, the CAC had recognised in Unite and Easyjet [footnote 5] that it should not consider alleged future breaches; and the Court of Appeal had indicated in Mennell v Newell & Wright (Transport Contractors) Ltd [footnote 6] that a statutory body has no jurisdiction to hear a complaint over an alleged threatened future breach when statutory wording indicates that a breach must already have happened. The Employer said that this was important because, since 1 January 2021 (CET), the time at which Adecco UK ceased to be bound by the Agreement in the light of the Adecco Group's actions on 17 December 2020, the CAC no longer had jurisdiction to hear a complaint against the Employer. Finally the Employer submitted that, as Adecco Ireland was not party to the Agreement at the time of the complaint, Adecco Ireland's stated approach to its future construction of the Agreement after 1 January 2021 (CET) could not found a complaint against the Employer on 30 December 2020. The Employer said that if the AEWC Steering Group disputed Adecco Ireland's current construction of the Agreement then it should complain in accordance with Ireland's European Works Council legislation instead of pursuing this complaint.

5. Summary of the Complainant's response to the Employer's response

10) In a letter to the Complainant dated 7 January 2021 the Case Manager said that the Panel Chair had noted that the Employer, together with Adecco Ireland, would support the CAC proceeding immediately to determine the complaint if the Complainant agreed to waive the requirement under the Agreement for the parties first to follow the agreed dispute resolution process. The Case Manager asked whether, in the light of this statement, the Complainant still wished to ask the CAC to suspend consideration of the complaint and, if so, for how long. In an email to the Case Manager dated 14 January 2021 the Complainant said that it agreed that on this occasion the parties should not follow the Dispute Resolution procedure and asked the CAC to resume consideration of the complaint. The Case Manager then invited the Complainant to address the substantive points relating to the merits of the complaint made by the Employer in its response dated 7 January 2021 summarised above. The Complainants addressed these points in submissions dated 22 January 2021.

11) The Complainant submitted that the representative agent, applicable law and Dispute Resolution procedure specified in the Agreement could be amended only by way of agreement with “an absolute majority of the Employee Representatives” as required by Clause IX.3 of the Agreement. The Complainant said that the second opening paragraph of the Agreement relied upon by the Employer to appoint the Irish representative agent applied only “If and when, Directives 94/45/EC and 2009/38/EC as well as subsequent Directives, and/or the national implementation thereof in the United Kingdom, are no longer effective within the United Kingdom” [emphasis added]. The Complainant submitted that TICER, which implemented Directives 94/45/EC and 2009/38/EC at the time the Agreement was signed in May 2018, continued to be “effective within the United Kingdom” and that, as a result, the second opening paragraph could not be used to override Article IX.3. The Complainant said that the UK Parliament had passed amendments to TICER on 4 March 2019 (The Employment Rights (Amendment) (EU Exit) Regulations 2019, Statutory Instrument 2019 No. 535) which maintained the effectiveness of TICER in amended form after the end of the Brexit transition period on 31 December 2020. The Complainant said that it understood that this was part of the Government’s commitment not to remove EU-derived employment rights following Brexit and referred to paragraphs of the Explanatory Memorandum to the legislation amending TICER [footnote 7] in support of that view. The Complainant said that this intention to maintain the Regulations in force and to allow the enforcement framework via the CAC to remain in place, was reflected in various changes to the Regulations including regulation 21 the first two clauses of which now provide as follows:

21.—(1) Where–

(a) a European Works Council or information and consultation procedure has been established before exit day under regulation 17 [ie under an EWC agreement]; or

(b) a European Works Council has been established before exit day by virtue of regulation 18 [ie under the subsidiary requirements],
a complaint may be presented to the CAC by a relevant applicant where paragraph 1A applies.

(1A) This paragraph applies where a relevant applicant considers that, because of the failure of a defaulter—

(a) the terms of the agreement made before exit day under regulation 17 or, as the case may be, the provisions of the Schedule, have not been complied with; or

(b) regulation 18A has not been complied with, or the information which has been provided by the management under regulation 18A is false or incomplete in a material particular.

The Complainant said that the AEWC was a “European Works Council … established before exit day under regulation 17” and the Agreement was an agreement made before exit day under regulation 17. The Complainant said that TICER therefore not only remained in force and “effective in the United Kingdom”, but explicitly continued to apply to the AEWC.

12) The Complainant said that it believed that it was possible that the Employer was unaware of these changes to the Regulations maintaining them in force after 31 December 2020 when it sought to use the second opening paragraph to amend the Agreement unilaterally. The Complainant said that it was quite clear to it that TICER continued to be effective in the UK, and that the second opening paragraph did not apply in the present circumstances. The Complainant

said that this was a very important issue because the choice of governing law for the Agreement, including the mechanism provided by that law for resolving any disputes between the AEWC and Management, was one of the most important elements of the Agreement.

13) The Complainant said that it did not dispute the need for the Adecco central management also to designate a representative agent in one of the EEA member states in order to comply with the requirements of the EWC Directive as transposed into the national laws of the member states. The Complainant said that this was clear from the wording of the EWC Directive and also from the European Commission's Notice to Stakeholders dated 21 April 2020 which says "the central management or the central management's representative agent have to be situated in the EU" (section 3) and "the law of the Member State where the central management or the 'deemed central management' or the central management's representative agent are situated will be relevant so as to ensure that the rights of employees under Directive 2009/38/EC remain enforceable within the EU" (section 4). The Complainant said that the Commission's Notice to Stakeholders concerned compliance with the EWC Directive, however, not compliance with TICER and did not take into account the fact that TICER had continued to apply since 1 January 2021 to an EWC established "before exit day under regulation 17". The Complainant said that the Notice also did not take into account the express wording of the Agreement requiring any change of representative agent and governing law to be agreed with the Employee Representatives. The Complainant said that it understood that both the EWC Directive (as transposed by the laws of the member states) and TICER continued to apply to Adecco, to the AEWC and to the Agreement. The Complainant said that it followed that, whilst the Adecco central management must designate a representative agent within the EEA for the purpose of the EWC Directive, in doing so it could not unilaterally "terminate" its designation of its UK subsidiary for the purpose of TICER; doing this would be contrary to the express wording of the amended Regulations which make clear that they apply to a European Works Council "established before exit day under regulation 17". The Complainant said that doing this would also be attempting to circumvent one of the purposes of the amendments to the Regulations which was to continue to make the complaint resolution process through the CAC available to the AEWC. The Complainant said that it believed that the Adecco Group continued to meet the employee thresholds in TICER and was therefore within scope of TICER and could not remove itself from their scope or from the jurisdiction of the CAC in the way that it appeared to believe that it could.

14) The Complainant submitted that there was no difference in practice between "construing" an agreement as amended, and actually amending that agreement unilaterally. The Complainant said that simply by calling it a "construction" did not mean that it was not a unilateral amendment, and it was clear that Management intended to treat the "constructions" listed in its note of 15 December 2020 (see paragraphs 4 and 9 above) as amendments to the Agreement.

15) The Complainant contested the Employer's submission that the complaint concerned an "an alleged future breach", and that when the complaint was made the Employer had not amended the Agreement, purported to amend it or acted or failed to act as if it had been amended. The Complainant said that Management had written to the AEWC Employee Representatives on 15 December 2020 stating: "Adecco Group AG has unilaterally appointed [past tense] Adecco Ireland Limited as its new representative agent for European Works Council purposes with effect from 1 January 2021 (CET)". Moreover, in a letter to the Boards of Directors of its UK and Irish subsidiaries dated 17 December 2020, the Adecco Group had said that it "has decided" (past tense) to terminate its designation of the Employer as its representative agent and nominate

Adecco (Ireland) as its new representative agent with effect from 1 January 2021 and that Adecco (Ireland) "has been "nominated in writing"(past tense) "as its representative agent in the State" and that Adecco "has made this decision [past tense] after due consideration …." The Complainant said that Management's note of 15 December 2020 to the Employee Representatives had then listed, as a consequence of its termination of the Employer and nomination of Adecco Ireland as representative agent, the provisions in the Agreement which it would in future "construe" in the way described in that note. The Complainant said that this was tantamount to unilaterally amending the Agreement on or before 15 December 2020, even if the amendments would not have effect until a later date.

16) The Complainant said that if Management had sought unilaterally to amend other parts of the Agreement, for example, to exclude some countries or some topics from its scope, or to abolish the requirement to hold an annual meeting or the right of the AEWC to have expert assistance or training, the AEWC would want to dispute the unilateral amendment to the agreement, not raise a complaint each time the amendment had an effect. The Complainant said that it was the same with the "construed" amendments notified to the Employee Representatives on 15 December 2020, and it was this breach, on or before 15 December 2020, which was the subject of the complaint made on 30 December 2020. The Complainant said that, in accordance with regulation 21 of TICER, the AEWC considered that, because of Management's failure to obtain agreement from a majority of the Employee Representatives to amendments to the Agreement, Clause IX.3 had not been complied with when Management notified the Employee Representatives of the "construed" amendments on 15 December 2020. The Complainant said that the circumstances in Unite and Easyjet [footnote 8] were entirely different to those here; in that case it was quite clear that the complaint about ballot arrangements was premature because the provisions in TICER that it was alleged had been breached set a precise timeframe for bringing a complaint (within 21 days of the publication of the final arrangements for the ballot), and the company had not yet published the final arrangements. The Complainant said that Mennell v Newell & Wright (Transport Contractors) Ltd [footnote 9], concerning an alleged deduction of wages which had not taken place when the complaint was made, was also irrelevant to the present complaint. The Complainant said that, by contrast, this complaint concerned a decision taken by Management on or before 15 December 2020 and notified to the Employee Representatives on 15 December 2020, which the Complainant considered was a breach of Article IX.3 of the Agreement. The Complainant quoted a statement in the Employer's response that "the importance of the CAC not being entitled to consider a future breach is that, since 1 January 2021 (CET), the time at which Adecco UK ceased to be bound by the Agreement in light (sic) of Adecco Group AG's actions on 17 December 2020, the CAC has no longer had jurisdiction to hear a complaint against Adecco UK". The Complainant said that it was those "actions on 17 December 2020" that were the subject of its complaint. The Complainant also said that the Employer's claim that "the CAC has no longer had jurisdiction to hear a complaint against Adecco UK" was precisely what so concerned the AEWC and was one of the reasons why the AEWC had brought the complaint; it was also contrary to the clear wording of the amended regulation 21 of TICER. The Complainant submitted that whether the complaint had been made before 31 December 2020 or after it, the CAC would still have jurisdiction to hear it either under the unamended regulation 21 (pre-31 December complaint) or under the amended regulation 21 (post-31 December complaint).

17) The Complainant noted the Employer's contention that Adecco Ireland was not party to the Agreement at the time of the complaint and that its stated approach to the future construction of the Agreement after 1 January 2021 could not, therefore, found a complaint against Adecco UK on

30 December 2020. In response the Complainant said that the Adecco Group was not permitted to remove the AEWC from the jurisdiction of TICER and the CAC by terminating the designation of its UK representative agent and unilaterally amending the representative agent clause in the Agreement. The Complainant said that it did not, therefore, accept that Adecco Ireland was now the sole representative agent for the purpose of the AEWC; rather it contended that the Employer remained the representative agent for the purpose of TICER.

18) The Complainant concluded by acknowledging that the Adecco central management was required to appoint a representative agent in one of the EEA member states for the purpose of the EWC Directive but said that, with the second opening paragraph not available as a means for management unilaterally to amend the Agreement, any changes to the provisions on representative agent, applicable law and dispute resolution must be made in agreement with the Employee Representatives in accordance with Clause IX.3. The Complainant said that the Employee Representatives would welcome the opportunity to negotiate and agree the appropriate changes with management.

6. Summary of the Employer's further submissions

19) The Case Manager copied the Complainant's submissions to the Employer on 25 January 2021 and invited the Employer to respond to those submissions. In a response dated 3 February 2021 the Employer reiterated that it had no case to answer, especially in the light of the Complainant's concession that the Adecco Group had to designate a new representative agent in a member state of the EU for the purposes of Directive 2009/38/EC with effect from 11pm (UK time) on 31 December 2020. [footnote 10]. The Employer said that, in summary, its position was that:

1) the Agreement expressly required the Adecco Group to replace the Employer as its representative agent;

2) that even if, as wrongly suggested by the Complainant, the UK's national implementation of Directive 2009/38/EC also had to cease to be effective in order for the Adecco Group to have acted as it did, the UK's national implementation of Directive 2009/38/EC, namely TICER as in force prior to 11pm (UK time) on 31 December 2020 ("Unamended TICER"), ceased to be effective in respect of the Adecco Group at 11pm (UK time) on 31 December 2020 in any event;

3) in any event, neither the Employer nor the Adecco Group attempted unilaterally to amend the Agreement; and

4) in any event , when made on 30 December 2020, the complaint concerned alleged future breaches of the Agreement and so was not one that the CAC may properly consider. The Employer said that this was of fundamental importance as, if the Complainant had not acted prematurely but had instead waited for an alleged breach of the Agreement after 11pm (UK time) on 31 December 2020 before complaining to the CAC, the CAC would not have had jurisdiction to hear such a complaint.

These submissions were developed in further detail later in the Employer's response and are summarised below.

20) The Employer said that the recognition by the Complainant that the Adecco Group had to designate a new representative agent in an EU member state for the purposes of the EWC Directive with effect from 11pm (UK time) on 31 December 2020 meant that the second opening paragraph not only permitted but, by its use of the word "shall", expressly required the Adecco Group to replace the Employer as its representative agent. The Employer said that the second opening paragraph was more particular than the general wording on amendment in Clause IX.3 of the Agreement . The Employer submitted that this meant that, even if there were a conflict between the two, which the Employer disputed, precedence should be given to the second opening paragraph having regard to the Court of Appeal's recognition in Golden Fleece Maritime Inc, Pontian Shipping SA v St Shipping and Transport Inc. that, in the event of inconsistency in an agreement "the 'particular should prevail over the general' if that is an acceptable translation of well-known legal principle, 'Generalia non specialibus derogant'." [footnote 11]

21) The Employer said that the fact that the second opening paragraph provided that the paragraph applied "If and when, Directives 94/45/EC and 2009/38/EC as well as subsequent Directives, and/or the national implementation thereof in the United Kingdom, are no longer effective within the United Kingdom" (emphasis added) meant that it did not require both circumstances to have to exist before the Adecco Group had to or could appoint a new representative agent. [footnote 12]. The Employer said that it was clear that the parties' intentions were that, for so long as the EWC Directive remained effective within the United Kingdom and Unamended TICER also remained effective in respect of the Adecco Group, the Adecco Group could not appoint a different representative agent. The Employer said that this was the position until 11pm (UK time) on 31 December 2020 and explained why the Adecco Group only changed its representative agent with effect from that time. However the Adecco Group had to appoint a new representative agent to replace Adecco (UK) if any of the following three alternatives occurred:

(1) The EWC Directive remained effective within the United Kingdom but Unamended TICER did not remain effective in respect of the Adecco Group;

(2) The EWC Directive ceased to be effective within the United Kingdom but Unamended TICER did remain effective in respect of the Adecco Group;

(3) The EWC Directive ceased to be effective within the United Kingdom and Unamended TICER also ceased to be effective in respect of the Adecco Group.

The Employer said that the inclusion of the "or" part of the phrase "and/or" was accordingly fatal to the Complainant's suggested interpretation of the second opening paragraph given its recognition that the EWC Directive ceased to be effective within the United Kingdom at 11pm (UK time) on 31 December 2020.

22) The Employer said that even if the Complainant were correct that the Adecco Group could not appoint a new representative agent merely because the EWC Directive ceased to be effective within the United Kingdom at 11pm (UK time) on 31 December 2020, Amended TICER could not have provided an effective legal framework in respect of the Adecco Group after that time in any event. The Employer said that at 11pm (UK time) on 31 December 2020 the transition period provided for by article 126 of the Withdrawal Agreement expired; as a matter of EU law, the EWC Directive ceased to be required to be construed in accordance with article 127(6) of the Withdrawal Agreement as if the UK were a EU member state; and as the Complainant had

recognised, the Adecco Group accordingly had to appoint a new representative agent in an EU member state for the purposes of EU law in the light of recital 24 and article 4(2) of the EWC Directive and the European Commission's Notice to Stakeholders. The Employer said that these changes cumulatively meant that TICER (as amended since 11 pm (UK time) on 31 December 2020 by part 1 of Schedule 2 to the Employment Rights (Amendment) (EU Exit) Regulations 1999) ("Amended TICER") did not provide an effective legal framework in respect of the Adecco Group on the following grounds:

(1) regulation 2(5) of Amended TICER provides that:

[i]n the absence of a definition in these Regulations, words and expressions used in particular regulations and particular paragraphs of the Schedule to these Regulations which are also used in the provisions of the Transnational Information and Consultation Directive or the Extension Directive to which they were designed to give effect have the same meaning as they have in those provisions;

(2) as Amended TICER does not define the term "representative agent", that term must mean the Adecco Group's representative agent for the purposes of the EWC Directive when used in regulation 5 of Amended TICER as follows:

This regulation applies where –

(b) the central management is not situated in a Relevant State and the representative agent of the central management (to be designated if necessary) is situated in the United Kingdom; or

(c) neither the central management nor the representative agent (whether or not as a result of being designated) is situated in a Relevant State and… (emphasis added);

(3) as it is common ground that the Adecco Group has a representative agent for the purposes of the EWC Directive in Ireland, a "relevant State" as defined in regulation 2(1) of Amended TICER, then regulation 5 of Amended TICER does not apply to the Employer;

(4) the inapplicability of regulation 5 of Amended TICER to the Employer is important as regulation 4(1) of Amended TICER provides that:

Subject to paragraph (2) the provisions of regulations 17 to 41 and of regulation 46 shall apply in relation to a Community-scale undertaking or Community-scale group of undertakings only where, in accordance with regulation 5, the central management is situated in the United Kingdom; and
(5) as regulation 21 of Amended TICER is not one of the small number of exceptions to the general rule detailed in regulation 4(2) of Amended TICER, the enforcement framework to which the Complainant referred has been inapplicable to the Employer since 11pm (UK time) on 31 December 2020. Amended TICER accordingly could not properly be said to be "effective" in respect of the Adecco Group.

23) The Employer further submitted that when regulations 2(5), 4(1), 4(2) and 5 of Amended TICER were read together, they were unambiguous that Amended TICER no longer applied to the Employer other than in the very limited ways detailed in regulation 4(2) of Amended TICER. The Employer said that, as such, aids to their interpretation were unnecessary, but that insofar as the CAC may consider to the contrary:

(1) the political statements and guidance concerning “the present Government’s commitment not to remove EU-derived employment rights following Brexit” to which the Complainant had referred were of no legal significance. [footnote 13]

(2) the Explanatory Memorandum to the Employment Rights (Amendment) (EU Exit) Regulations 2019 to which the Complainant had referred should be given only limited if any weight. [footnote 14]

(3) the Employment Appeal Tribunal in Manpower [footnote 15] provided that:

As to interpretation of the Regulations in the light of the Directive, it is uncontroversial that when a national court interprets a provision of national law, it is required to do so as far as possible in the light of the wording and purpose of community law in order to achieve the result sought by Community law: Marleasing SA v La Comercial Internacional de Alimentacion SA C-106/89 [1990] ECR I4135. The only constraints on the broad and far-reaching nature of that interpretative obligation are that (a) the meaning should go with the grain of the legislation and be compatible with the underlying thrust of the legislation being construed, and (b) that the exercise of the interpretative obligation cannot require the courts to make decisions for which they are not equipped or give rise to important practical repercussions which the court is not equipped to evaluate: see Vodafone 2 v Revenue and Customs Commissioners [2010] Ch 77 at [38] and cases cited therein”.

The Employer said that in the light of section 6(3)(a) of the European Union (Withdrawal) Act 2018, Parliament’s decision not to amend regulation 2(5) of TICER when enacting the Employment Rights (Amendment) (EU Exit) Regulations 2019 meant that Manpower remained “good law” and the CAC’s interpretation of Amended TICER must therefore “go with the grain of the legislation and be compatible with the underlying thrust of the legislation being construed”. The Employer submitted that the CAC may not properly interpret regulations 2(5), 4(1), 4(2) and 5 of Amended TICER in a way that would fundamentally depart from the EU law principle that a representative agent can only be situated in a member state of the EU or a state that is treated for EU law purposes as if it were such as state, such as under article 127(6) of the Withdrawal Agreement; and

(4) the following statements made by the Parliamentary Under-Secretary of State for Business, Energy and Industrial Strategy to the House of Commons when moving the EU Exit Regulations on 13 February 2019 were ones which the CAC may properly consider having regard to Pepper v Hart [footnote 16] :

a) on the fundamental consequences of a “no-deal” Brexit in respect of European Works Councils, as happened at 11pm (UK time) on 31 December 2020:

The Employment Rights (Amendment) (EU Exit) Regulations 2019 make changes to the rules on European works councils. Businesses and trade unions in the UK value the opportunity for employee engagement and consultation that the councils provide, and the Government recognise and encourage those benefits. However, withdrawing from the EU without a deal will mean that the UK is no longer covered by EU rules on European works councils.

In that scenario, it would be for the EU to give UK workers the right to be represented on the councils. It is an unavoidable and unfortunate truth that there is no way for the UK unilaterally to ensure that workers in this country retain that right without a deal. There is also no way to replicate the European works council system only in the UK, as their purpose is to enable cross-border engagement. That requires the same rules in all countries, which requires a withdrawal agreement" (emphasis added); and

b) on the continuing importance of Amended TICER having regard to regulation 4(2) of Amended TICER and the provisions that continue to apply to the Employer, such as in respect of the UK employees' representatives who remain entitled to participate in the AEWC now operating under Irish law:

Our domestic regime for employee engagement and consultation will remain in place, and we will encourage businesses to continue to allow UK workers to be represented on a voluntary basis in European works councils. We are retaining as many of the existing rules as we can to enable that. All existing protections for workers and for their representatives on European works councils—even those there voluntarily—will be maintained. Approving the draft regulations is the only way to ensure that workers involved in European works councils are protected if there is no deal. They deliver on our commitments.

24) The Employer submitted that neither it nor Adecco Ireland had attempted unilaterally to amend the Agreement. The Employer disputed the Complainant's suggestion that there was no difference in practice between "construing" an agreement as amended, and actually amending that agreement unilaterally and that the Adecco Group's actions were "tantamount to unilaterally amending the Agreement on or before 15 December, even if the amendments would not have effect until a later date". The Employer contended that the Complainant had confused cause and effect: it had complained that the Adecco Group had attempted unilaterally and improperly to amend the Agreement and so, as that was of no effect, the Employer remained its representative agent whereas in fact the Adecco Group had changed its representative agent in accordance with the Agreement and that action alone had changed the Agreement's proper construction. The Employer said that Clause IX.3 of the Agreement was clear that the Agreement could only be amended by agreement between its parties but none of the Employer, Adecco Ireland or the Adecco Group had ever attempted unilaterally to amend the Agreement. Rather, the Adecco Group had terminated the Employer's appointment as its representative agent and appointed Adecco Ireland as its replacement with effect from 11pm (UK time) on 31 December 2020.

25) The Employer said that it recognised that the actions described in paragraph 24 above had consequences affecting how the Agreement should properly be construed. The Employer said that the distinction between an amendment of the Agreement and actions having consequences affecting its proper construction was a subtle but important one but that a similar distinction existed under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") If an employer enters into a contract with a third party (the "transferee") that amounts to a relevant transfer under regulation 3 of TUPE, regulation 4(1) provides that certain employees' contracts "shall have effect after the transfer as if originally made between the person so employed and the transferee". The Employer said that, in an analogous way to a relevant transfer affecting the proper construction of a contract of employment notwithstanding the absence of an employee's consent to its amendment, the Adecco Group's actions had affected the proper construction of the Agreement

notwithstanding the absence of the AEWC's consent. The Employer said that the automatic nature of the consequences that flowed from the Adecco Group's actions was important as it explained why it simply had no need to try unilaterally to amend the Agreement. In particular:

(1) paragraph 3 of the European Commission's Notice to Stakeholders had stated that if it failed to act "before the end of the transition period, as of that date, the role of representative agent will be automatically transferred to the establishment or group undertaking employing the greatest number of employees in a Member State, which will become the 'deemed central management' pursuant to Article 4(3) of Directive 2009/38/EC" (emphasis added); and

(2) paragraph 4 of the Notice had stated that, after such a transfer, "the law of the Member State where the central management or the 'deemed central management' or the central management's representative agent are situated will be relevant so as to ensure that the rights of employees under Directive 2009/38/EC remain enforceable within the EU. While it is thus not necessary to amend agreements referring to the legislation of the United Kingdom, it is highly recommended to amend such agreements and stipulate explicitly the law of a Member State for the sake of clarity and legal certainty" (emphasis added).

26) The Employer submitted that the complaint made on 30 December 2020 concerned alleged future breaches of the Agreement and so was not of a nature that the CAC may properly consider. The Employer said that if the Complainant had not acted prematurely but had instead waited for an alleged actual breach of the Agreement before complaining to the CAC, the CAC would no longer have had jurisdiction to hear its complaint. The Employer said that Regulation 21(2) of TICER provides that in "this regulation, "failure" means an act or omission and a failure by the local management shall be treated as a failure by the central management." The Employer submitted that the CAC's role was accordingly to determine whether a specific act or omission by the Employer constituted a "failure" for which it could be held liable. The Employer said that any similarity in practical consequences between a lawful change in representative agent by the Adecco Group and an improper purported unilateral amendment of the Agreement by the Employer was accordingly an irrelevant consideration to which the CAC may not properly pay regard. The Employer disputed the Complainant's contention that it should not have to wait to "raise a complaint each time" that the Employer allegedly breached the Agreement and that it was able immediately to bring a complaint on 30 December 2020 notwithstanding the Court of Appeal's decision in Mennell v Newell & Wright (Transport Contractors) Limited [footnote 17]. The Employer contended that the premature nature of the complaint made on 30 December 2020 was of fundamental importance. The Employer said that the Complainant's oversight that regulation 21 of Amended TICER no longer applied to the Employer for reasons previously outlined meant that the CAC only had jurisdiction to hear a complaint against the Employer over the Adecco Group's change of representative agent in the light of paragraph 41 of schedule 2 to the Employment Rights (Amendment) (EU Exit) Regulations 2019. The Employer said that if the Complainant had waited to bring a complaint to the CAC until the Employer had construed the Agreement and then acted in the light of its construction after 11pm (UK) on 31 December 2020 then the CAC would have had no jurisdiction to hear that complaint.

27) The Employer said that the Complainant had now recognised that the Adecco Group was entitled to appoint a new Irish representative agent for the purposes of the EWC Directive with effect from 11pm (UK) time on 31 December 2020 but had nevertheless failed to recognise when suggesting that the Adecco Group now had two representative agents that:

(1) regulation 2(5) of Amended TICER and the EAT's decision in Manpower required uses of the term "representative agent" in Amended TICER to continue to be construed in accordance with EU law;

(2) it was immaterial whether the European Commission took into account that Amended TICER would apply in the United Kingdom after 11pm (UK time) on 31 December 2020. As its recent correspondence of 26 January 2021 confirmed, "the United Kingdom is a third country as regards the application of EU law". [footnote 18] The Employer said that the UK's laws were accordingly irrelevant to the meaning of the term "representative agent" in Directive 2009/38/EC;

(3) a construction of Amended TICER requiring the Adecco Group's subsidiaries either to operate:

a) two European Works Councils under an identical agreement but for one being under Irish law and one being under UK law; or

b) one European Works Council that is simultaneously governed both by Irish law and UK law and subject to simultaneous dispute resolution in both Ireland and the UK, would, in the Employer's opinion, lead to absurdity (as such term is understood in the context of statutory interpretation). It would also raise significant practical issues such as the following:

a) Clause III.1.1 of the Agreement provides that the "Employee Representatives shall be either elected or appointed according to the legislation in their respective countries covered by the present Agreement";

b) EU law and national law in member states of the EU ceased to recognise any concept of a "UK law European Works Council" at 11pm (UK time) on 31 December 2020. As such, in a member state such as Ireland, there is no legislation under which to elect Irish members of a "UK law European Works Council". Further, the Irish Labour Court confirmed in Fujitsu Microelectronics Ireland Limited v SIPTU [footnote 19] that even existing employees' representatives have no stand-alone entitlement to attend meetings on topics concerning transnational information and consultation other than in the legal framework now provided for by the EWC Directive; and

c) the Employer would be unable to continue to perform its obligations under the Agreement, such as procuring the attendance at meetings of employees employed in member states of the EU. This reflects that, without the legal framework on cross-border cooperation created by article 11(1) of the EWC Directive, [footnote 20] it could not exercise control over all other group entities. This meant that, even if the Agreement had in principle been able to continue in force past 11pm (UK time) on 31 December 2020 notwithstanding all of the above, it would immediately have terminated at that time by operation of law in any event in accordance with the doctrine of frustration for two reasons. First, the opening paragraphs of the Agreement had made it clear that, in May 2018 and when Brexit was a realistic prospect, the parties had not intended that the Adecco Group should have to operate separate European Works Council arrangements with one of those arrangements falling within and the other falling outside of the legal framework governed by the EWC Directive. Second, if the Employment Rights (Amendment) (EU Exit) Regulations 2019 had somehow required the Employer to operate a parallel European Works Council arrangement to that operated by Adecco Ireland but without the benefit of article 11(1) of the EWC Directive to procure cross-border assistance from other members of the Adecco Group, that would have radically transformed the nature of its obligations compared to those it agreed to undertake in May 2018.

28) The Employer concluded its submissions by noting that both UK and all other employees had continued to participate in the AEWC since 11pm (UK time) on 31 December 2020 on materially identical terms as before that time. The Employer said that a finding that this complaint was not well-founded would accordingly be consistent with the general principle detailed in HPE [footnote 21] that, in the absence of a contractual restriction or bad faith, a company such as the Adecco Group was entitled to change its representative agent to one situated in Ireland irrespective of the views of the AEWC.

7. Considerations

29) The Panel is grateful to the parties for their detailed written submissions and accompanying documentation which the Panel has considered carefully.

30) Both parties focussed their primary submissions on whether the change of representative agent was governed by Clause IX.3 of the Agreement or whether it could be made under the provisions of the second opening paragraph. Clause IX.3 reads as follows:

The provisions of this Agreement may be amended at any time, without affecting the whole of this Agreement or its validity, by Management together with an absolute majority of the Employee Representatives.

The second opening paragraph reads as follows:

If and when, Directives 94/45/EC and 2009/38/EC as well as subsequent Directives, and/or the national implementation thereof in the United Kingdom, are no longer effective within the United Kingdom, the Adecco Group shall appoint a Representative Agent established in a country which applies Directives 94/45/EC and 2009/38/EC as well as subsequent Directives. Before the Representative Agent is appointed, the Management may ask the opinion of the employee representatives within the AEWC on the Management proposal and such process will be finalized at the earliest convenience and ultimately within a period of two months after the Management proposal.

Unlike Clause IX.3, therefore, the second opening paragraph does not require the consent of a majority of the Employee Representatives for a new representative agent to be appointed. The Complainant contended that the change of representative agent could be made only in accordance with Clause IX.3; the Employer submitted that it was required to, and could, appoint a new representative agent under the terms of the second opening paragraph.

31) The first matter for the Panel to consider is whether the second opening paragraph is capable under the Agreement of applying to the change of representative agent notwithstanding the terms of Clause IX.3. The Panel notes that the matter could have been placed beyond doubt by making it explicit in the second opening paragraph that it was intended to constitute an exception to Clause IX.3 Nevertheless the Panel considers that the second opening paragraph is drafted in sufficiently clear and unambiguous terms for the Panel to conclude that it was intended by the signatories to the Agreement to govern the appointment of a new representative agent in the circumstances specified. The Panel next has to consider whether the specified circumstances apply in this case. These circumstances are as follows:

If and when, Directives 94/45/EC and 2009/38/EC as well as subsequent Directives, and/or the national implementation thereof in the United Kingdom, are no longer effective within the United Kingdom ….

The Panel has concluded that the words "and/or" mean that it is sufficient that only one of the stipulated criteria is satisfied, ie it is sufficient that either the Directives specified or "the national implementation thereof in the United Kingdom" are no longer effective within the United Kingdom. The Panel is further satisfied that, as of 1 January 2021 (CET), the EWC Directives specified were no longer effective within the United Kingdom.

32) The Employer contended that the entirety of the complaint made by the Complainant to the CAC, including the complaint as it relates to the appointment of the new representative agent, was premature in that the alleged breach of the Agreement occurred on 1 January 2021 (CET) and the complaint was made on 30 December 2020. Regulation 21 of TICER reads, so far as material, as follows:

(1) Where –

(a) a European Works Council or information and consultation procedure has been established under regulation 17; or

(b) a European Works Council has been established by virtue of regulation 18, a complaint may be presented to the CAC by a relevant applicant where paragraph (1A) applies.

(1A) This paragraph applies where a relevant applicant considers that, because of the failure of a defaulter,

(a) the terms of the agreement under regulation 17 …have not been complied with …

(1B) A complaint brought under paragraph (1) must be brought within a period of six months beginning with the date of the alleged failure or non-compliance.

(2) In this regulation, "failure" means an act or omission ….

The Employer contended that the wording of regulation 21(1A)(a) that "the terms of the agreement … have not been complied with" mean that the breach of the Agreement must already have occurred. The Panel agrees that regulation 21 of TICER covers only breaches which have already taken place. Its conclusion on this point is reinforced by the provisions of regulation 21 concerning remedies. Regulation 21(4) states that:

Where the CAC finds the complaint well- founded it shall make a decision to that effect and may make an order requiring the defaulter to take such steps as are necessary to comply with the terms of the agreement under regulation 17 …

Regulation 21 (5) states that an order made under paragraph (4) shall specify –

(a) the steps which the defaulter is required to take;

(b) the date of the failure ….

These provisions are consistent with the view that the failure which the defaulter can be required to remedy must already have occurred. The Complainant did not dispute this interpretation of regulation 21; rather it submitted that the complaint concerned a decision taken by Management on or before 15 December 2020 and notified to the AEWC on that date. The Panel agrees with this analysis in relation to the appointment of the new representative agent. The letter dated 15 December 2020 sent by the Employer and Adecco Ireland to the AEWC headed “Representative Agent for European Works Council Purposes” states “Adecco Group AG has unilaterally appointed Adecco Ireland Limited as its new representative agent for European Works Council purposes with effect from 1 January 2021 (CET)”. The Panel is satisfied that, insofar as the complaint relates to the appointment of a new representative agent, it was not made prematurely.

33) The Complainant did not seek to argue that the terms of the second opening paragraph had not been met because the appointment, having in its view been made on or before 15 December 2020, was made before the Directive was “no longer effective in the United Kingdom”, ie before 1 January 2021 (CET). Rather, the Complainant’s focus was on what it submitted was the continuing effectiveness of TICER. The Panel has nevertheless considered this matter carefully. The Panel observes that the appointment of Adecco Ireland on or before 15 December 2020 could, on one view, be regarded as a premature application of the second opening paragraph depending upon whether the words “if and when” at the start of that paragraph are intended to lay down strict temporal limits on its application or whether they are intended to describe in more general terms the circumstances in which its provisions apply. The matter is not free from doubt but the Panel has decided that, on the balance of probabilities, the latter is the more likely interpretation in a situation where there was no indication at the time the power to appoint was exercised that the specified Directives would not cease to be effective in the near future. The Panel also notes that the EWC Directive does not envisage a gap between the termination of one designated agent and the appointment of another so that, realistically, a new representative agent would need to be designated before the end of the transition period to avoid the role being automatically transferred to a ‘deemed central management’ pursuant to Article 4(3) of the EWC Directive. The Panel notes the Complainant’s submission that there is a distinction to be drawn between the appointment of a new representative agent for the purpose of the EWC Directive, on the one hand, and that of the Agreement and TICER on the other but takes the view that the parties must be taken to have negotiated the second opening paragraph with the EWC Directive in mind (and indeed the Directive is specifically referred to in the Agreement’s preamble). The Panel has therefore concluded that the Adecco Group was required, and empowered, to appoint a new representative agent in accordance with the terms of the second opening paragraph in this case.

34) In view of the Panel’s conclusion that the terms of the second opening paragraph were satisfied when the specified Directives ceased to be effective in the UK, the Panel was not required to make any findings on the submissions made by the parties regarding the status of TICER from I January 2021 (CET) for the purposes of the second opening paragraph and it has made no such findings.

35) The second opening paragraph is confined to the appointment of a representative agent; it does not cover the further changes to the Agreement which Management wished to come into effect on 1 January 2021 (CET) regarding the applicable law, (Clause IX.1) Dispute Resolution procedure (Clause IX.5), and other provisions of the Agreement. The Complainant did not submit that these changes should be considered in a distinct way from the appointment of a new representative agent, perhaps as a necessary consequence of its primary submission that all the

changes Management wished to make were subject to Clause IX.3. In the light of the Panel's conclusion that the appointment of the new representative agent under the second opening paragraph did not constitute a breach of the Agreement the Panel considers it necessary to give separate consideration to the remaining changes which are the subject of the complaint.

36) The Employer's primary submission in relation to these changes was that they were merely matters of "construction" rather than amendments to the Agreement and that they did not, therefore, require the consent of a majority of the Employee Representatives under Clause 1X.3. The Panel does not agree with this submission. The Panel does not accept that the change of representative agent of itself changed the Agreement's proper construction; it may have seemed advisable to change Clauses IX.1 and IX.5 as a consequence of the change of representative agent but that does not mean that it automatically and without more altered the substantive content of those provisions. Indeed the letter of 15 December 2020 itself makes clear that these changes required material alterations to the text of the Agreement and could not be achieved merely by reading the existing text in an alternative way. The Panel also rejects the analogy which the Employer sought to draw between the situation here and TUPE, where the regulations make specific provision for the impact of a relevant transfer on the proper construction of a contract of employment. The Panel is satisfied that the changes to the applicable law, Dispute Resolution procedure and other provisions set out in the letter dated 15 December 2020 from the Employer and Adecco Ireland to the AEWC constitute amendments or purported amendments to the Agreement.

37) As stated in paragraph 32 above the Employer sought to argue that the entirety of the Complainant's complaint was premature for the reasons set out in that paragraph. The Complainant, for its part, sought to argue that all the breaches of the Agreement which it alleged had taken place had done so on or before 15 December 2020. The Panel considers that it is necessary to give separate consideration to the timing of the appointment of the new representative agent, on the one hand, and the amendments or purported amendments relating to the applicable law, Dispute Resolution procedure and other provisions set out in the letter dated 15 December 2020 on the other. As stated in paragraph 32 above, the letter of 15 December 2020 was explicit in stating that the Adecco Group had unilaterally appointed its new representative agent, Adecco Ireland and this was the basis of the Panel's conclusion that the appointment had been made by that date. Above a table of the other changes listed in the letter were the words "… with effect from 1 January 2021 (CET) … Adecco Ireland Limited will give effect to the AEWC Agreement except where construing it as follows". Having considered the matter carefully the Panel is not persuaded that Clauses 1X.1, 1X.5 or the other provisions listed in that table had been amended or purportedly amended on 15 December 2020 or, indeed, at any time prior to 1 January 2021 (CET).

38) The Panel notes the Complainant's submission that if the Employer had sought to amend the Agreement in other respects, such as excluding some countries or topics from its scope or abolishing the requirement to hold an annual meeting, it would have wished to dispute the unilateral amendment not raise a complaint each time the amendment took effect. However even if that proposition is correct (on which the Panel makes no finding) a complaint could be brought only when the Agreement had been unilaterally amended not merely when a unilateral amendment had been proposed or threatened. In this case the alleged breach lies in Management notifying the AEWC that the Agreement would be amended in specific respects without an absolute majority of the Employee Representatives having been obtained. In the Panel's view this constituted

notification of an alleged intended future breach. [footnote 22] As stated in paragraph 32 above the Panel is not empowered to find a complaint based on a breach which has not yet occurred well-founded. The Panel has therefore concluded that the complaint under regulation 21 of TICER that the Employer had failed to comply with the terms of the Agreement in relation to the amendments or purported amendments to Clauses IX.1, IX.5 and other provisions of the Agreement was premature.

8. Decision

39) For the reasons given in paragraph 31-38 above, the Panel does not consider the complaint set out in paragraph 5 above to be well-founded.

9. Concluding observations

40) The Complainant submitted that whether the complaint had been made before 31 December 2020 or after it the CAC would still have jurisdiction to hear it either under regulation 21 of TICER as unamended or under the amended regulation 21. The Employer contended that the CAC would have had no jurisdiction to hear the complaint after 31 December 2020. The Panel has not found it necessary for the purposes of this decision to decide whether a complaint based on these grounds could have been heard by the CAC after 31 December 2020 and it makes no findings on that matter.

41) The Panel notes the Complainant's submission that there is a distinction to be drawn between the appointment of a new representative agent for the purposes of the EWC Directive, on the one hand, and for the purposes of the Agreement and of TICER on the other. In view of the Panel's conclusion that the appointment of a new representative agent had been made in accordance with the Agreement the Panel did not find it necessary to reach a conclusion on that matter.

Professor Gillian Morris, Panel Chair

Mr Robert Lummis

Mr Gerry Veart

15 February 2021

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1. Paragraph 3 of the Notice reads as follows: According to Article 4(1) and (2) of Directive 2009/38/EC, the central management or the central management's representative agent have to be situated in the EU. Therefore, after the end of the transition period, for those European Works Councils for which the thresholds in Article 2 of Directive 2009/38/EC continue to be met within the Union, but which have their central management or their representative agent in the United Kingdom, either the role of central management will have to be transferred to a Member State or the central management will have to designate a new representative agent in a Member State. If the central management fails to take one of these steps before the end of the transition period, as of that date, the role of representative agent will be automatically

transferred to the establishment or group undertaking employing the greatest number of employees in a Member State, which will become the 'deemed central management' pursuant to Article 4(3) of Directive 2009/38/EC.

2. The complaint referred to "section" IX.3 of the Agreement; in its response the Employer refers to "articles" of the Agreement. The Agreement itself refers to "clauses" and we therefore use that nomenclature in this decision.
3. See note 1 above for the text of paragraph 3.
4. Paragraph 4 of the Notice reads as follows: After the end of the transition period, the law of the Member State where the central management or the 'deemed central management' or the central management's representative agent are situated will be relevant so as to ensure that the rights of employees under Directive 2009/38/EC remain enforceable within the EU. While it is thus not necessary to amend agreements referring to the legislation of the United Kingdom it is highly recommended to amend such agreements and stipulate explicitly the law of a Member State for the sake of clarity and legal certainty….
5. EWC/4/(2008), paragraph 13
6. [1997] IRLR 519. "The industrial tribunal had no jurisdiction to hear any complaint by Mr. Mennell against the employers under the Wages Act 1986. A worker may present a complaint under that Act… but section 5(1) makes it clear that the industrial tribunal may only hear a complaint by a worker in a case where the employer "has made a deduction from his wages." There is no jurisdiction to entertain a complaint about a threatened deduction from wages. There must be an actual deduction".
7. 7.4 A no deal exit would mean that after exit the UK is no longer included within EU rules on European Works Councils. As such changes are required to the legislative framework set out in the TICE Regulations 1999 to address this. In a 'no deal' scenario, the government will ensure the enforcement framework, rights and protections for employee representatives in the UK European Works Councils continue to be available, as far as possible. [in fact the legislative changes have come into effect notwithstanding that a Withdrawal Agreement and an EU-UK Trade and Co-operation Agreement have been signed] 7.5 Provisions relevant to existing European Works Councils, which can continue to operate, are maintained. These include: • the enforcement framework, for example where there is a dispute about the operation of an existing European Works Council; • the employee representative rights and protections, such as the rights to training and time off, and the protections from suffering detriment or unfair dismissal; and • the protection for confidential information shared with the European Works Council or through the information and consultation procedure.
8. Note 5 above.
9. See note 6 above.
10. In its further submissions, but not elsewhere, the Employer referred to 11pm UK time on 31 December 2020 rather than 1 January 2021 (CET). These are, of course, the same in temporal terms. In this decision we refer generally to 1 January 2021 (CET) but we have not altered the terminology used by the Employer in summarising its further submissions.
11. [2008] EWCA Civ 584 at [13].
12. The Employer did not qualify this statement by suggesting that the representative agent could have been changed in circumstances other than those specified in the second opening paragraph in accordance with Clause IX.3. Although not material to the Panel's conclusions, the Panel does not see why such a change could not have been made.

13. The Employer referred to Mr Gordon Lean & Manpower Group (3) EWC/15/(2017) footnote 9 where the CAC said “[p]ublications put out by law firms such as Eversheds Llp or Lewis Silkin Llp, or BEERG are not binding on us, and the BIS publication Mr Hayward referred to is not statutory guidance. It is the Regulations that are to be construed, not commentary on the Regulations”;
14. The Employer referred to the dicta of Lord Steyn in Westminster City Council v National Asylum Support Service [2002] UKHL 38 that explanatory notes “do not form part of” legislation and “are not endorsed by Parliament” (at 4); and, at [6] “[w]hat is impermissible is to treat the wishes and desires of the Government about the scope of the statutory language as reflecting the will of Parliament. The aims of the Government in respect of the meaning of clauses as revealed in Explanatory Notes cannot be attributed to Parliament. The object is to see what is the intention expressed by the words enacted”.
15. UKEAT/0096/18/DA at [23]
16. [1993] 1 All ER 42, HL.
17. See note xx above.
18. The Employer exhibited a letter from a representative of the European Commission containing this quote. The letter was, in fact, electronically signed on 25 January 2021 not 26 January 2021 as the Employer stated in its submissions.
19. LCR14189
20. “Each Member State shall ensure that the management of establishments of a Community-scale undertaking and the management of undertakings which form part of a Community-scale group of undertakings which are situated within its territory and their employees’ representatives or, as the case may be, employees abide by the obligations laid down by this Directive, regardless of whether or not the central management is situated within its territory”.
21. EWC/19 (2018) at paragraphs 44-54.
22. The Employer contended that, as Adecco Ireland was not party to the Agreement at the time of the complaint, its stated approach to the future construction of the Agreement after 1 January 2021 (CET) could not found a complaint against the Employer on 30 December 2020. The Panel has not found it necessary to make a finding on that submission and it has not done so.

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